Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

A P P E N D I X

SUPREME COURT OF THE UNITED STATES

TERM, 1974

NO. 74-676

W. J. ESTELLE, JR.,
Petitioner

v.

HARRY LEE WILLIAMS,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED
NOVEMBER 29, 1974
CERTIORARI GRANTED JANUARY 27, 1975

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RELEVANT DOCKET ENTRIES

1. Petition For Writ Of Habeas Corpus

2. Order To Amend Pleadings

3. Petitioner's First Amended Original Petition

4. Respondent's Motion To Dismiss And Answer

5. Reporter's Transcript Of Federal Habeas Proceedings

6. Memorandum And Opinion Denying Habeas Relief

[fol. 54] * * *
[fol. 55]

IN THE ____ UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HARRY LEE WILLIAMS)
)
v.) NO. CA72H432
)
C. V. KERN)

PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, HARRY LEE WILLIAMS, Petitioner in the above cause, and files this its Petition for Writ of Habeas Corpus and to that end would respectfully show that Petitioner seeks, in this Court of equity, to inquire into the legality of the restraint of Petitioner's personal liberty, as follows:

I.

That, HARRY LEE WILLIAMS, is imprisoned and restrained of his liberty in the Harris County Rehabilitation Center at 2310 Atascocita Road, Humble, Harris

County, Texas; by C. V. "Buster" Kern, Sheriff of Harris County, Texas.

II.

That imprisonment is by virtue of a commitment for ten (10) years, resulting from a conviction on November 9, 1970, in Cause No. 151,738; State of Texas vs. Harry Lee Williams; In the 177th District Court of Harris County, Texas, which conviction was appealed by appointed counsel, the undersigned attorney, to the Court of Criminal Appeals of Texas, Cause No. 44,545, which Court of Criminal Appeals affirmed said conviction, and overruled Petitioner's Motion for Rehearing on March 22, 1972.

III.

First Ground

Petitioner would show that the Trial Court committed fundamental error and the Texas Court of Criminal Appeals' failure to correct same being error, by its failing to direct that Petitioner wear something other

than Harris County Jail clothes [fol. 56] during his jury trial. The fact that Petitioner was tried in jail clothes infringed his fundamental right of presumption of innocence.

Facts

Although Petitioner made no in Court objection (the Trial being prior to the holding in Hernandez v. Beto), the District Attorney told the jury panel:

> "this Defendant is sitting in jail clothes" (R 45 L 19).

Both of the State's principle witnesses pointed out Defendant as wearing a white uniform (R 108 L 17 and R 141 L 21). The record shows that Defendant told the Court that he was in jail during trial (R 241 L 3) and that he was in street clothes on the night of the arrest (see picture R 243).

Petitioner would rely on Hernandez v. Beto, 443 F2d 634, 637 (5th Cir 1971) which declares that to try a Defendant in

his prison garb infringes his fundamental right of presumption of innocence:

> "The record makes it abundantly clear that no objection was lodged by counsel to the prison garb worn by Hernandez because, at the time, it was common practice to try prisoners held in jail in their prisoner clothing, and that a motion for a change of attire, in counsel's opinion, would have been denied as frivolous." Hernandez, p 636.

Petitioner would show that his case and that of Hernandez were tried in the same courthouse within a few months of each other, in the same district, under the same procedure and practices.

The 5th Circuit went on to cite the rather obsolute language in Brooks v. Texas, 381 F2d 619, 624 (5th Cir 1967) where it said:

> "It is inherently unfair to try a Defendant for a crime while garbed in his jail uniform, especially when his civilian clothing is at hand."

The Court continued in Hernandez:

> "under these circumstances we cannot equate the inherent unfairness of being tried in prison garb with harmless error. [fol. 57] The probable impact on the jury of Hernandez' appearance in the Courtroom makes it impossible for us to declare a belief that it was harmless beyond a reasonable doubt." (at p. 637).

The case at bar and the Hernandez case are one and the same in regard to the prison garb issue. Further, Garcia v. Beto, ___ F2d___ (No 71-1383 5th Cir) is not applicable here because the defense did not try to prove how long Defendant had been in jail as a means to elicit sympathy from the jury. The State mentioned Defendant's prison garb first, and Defendant did what he could to minimize the harm done to the presumption of innocense. Counsel was well aware that all prisoners in the 177th District Court of Harris County, as well as every single other Court

of Harris County, were tried in prison clothes prior to Hernandez v. Beto, which was handed down while this case was pending before the Texas Court of Criminal Appeals.

Further, Petitioner would show that nowhere does the record show that Defendant intelligently waived the fundamental right of presumption of innocence.

IV.

Second Ground

Appellant would further show that Defendant was denied the assistance of effective and competent counsel.

Petitioner was declared and certified an indigent by the Trial Court long before trial and appointed an attorney for trial purposes, and later appointed present counsel for purpose of appeal. It should be assumed from the state of the record, that trial counsel was appointed since

nothing shows otherwise. This Petitioner should,therefore, come within the rule stated in Rodriguez v. State, 340 SW2d 61 (Tex Crim App) where it was declared the Trial Court had the burden and duty to see that trial counsel has the ability to protect the rights of the Defendant. Trial counsel did not make a single objection to the avalanche of seriously objectionable testimony and evidence; nor did he make any objection to the Court's charge or press for the submission of a self defense issue; and Trial counsel failed to [fol. 58] call a single witness for the defense. Such inaction by the trial counsel can be none other than ineffective counsel as the rule was laid down in Vessels v. State, 432 SW2d 108, 116 (Tex. Crim App).

V.

Petitioner would show he has exhausted his state remedies, in that he raised both of these issues before the Texas Court

of Criminal Appeals in his written brief, along with three (3) other points of error, and again in his Motion for Rehearing. To substantiate same, Petitioner hereby makes request of the Texas Court of Criminal Appeals to deliver the record, or a copy of same, of the said appeal, available to this Honorable Court, and that such be free of charge to Petitioner for the reason that he is indigent and has been from the commencement of this entire cause, which allegation is supported by attached affidavit.

Further, Petitioner requests appointed counsel for purposes of the Writ Hearing.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Petition be set for hearing and this Court grant a Writ of Habeas Corpus for the purpose of setting an evidentiary hearing to determine the legality of the restraint of said Peti-

tioner; and upon final hearing hereof, that this Honorable Court order Petitioner's release or retrial on this cause in accordance with law; and further, if this Petition be denied after a hearing, that the Court, pursuant to Rule 52(a), file its Findings of Fact and Law.

Respectfully submitted,

HARRY LEE WILLIAMS

APPROVED:

TIPTON, BISHOP & COMPANY

BY: s/ BEN L. ADERHOLT
BEN L. ADERHOLT
Attorney for Petitioner
608 Fannin, Suite 1500
Houston, Texas 77002 (223-4644)
APPOINTED COUNSEL BY STATE OF TEXAS FOR STATE APPEAL ONLY

[fols. 59-67] * * *

[fol. 68)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ORDER ENTERED ON JUDGE'S CALENDAR

9/5/72: Defendant's Motion to Dismiss or, in the Alternative, Motion for Judgment on the Pleadings is denied at this time. In view of plaintiff's response thereto, plaintiff is directed to amend his complaint to include all proper defendants as parties and to make proper service. All defendants shall thereupon respond to such amended complaint. Clerk shall notify parties.

C.O.B., Jr.

[fol. 69]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HARRY LEE WILLIAMS, Petitioner	X	
VS.	X	CIVIL ACTION NO. 72-H-432
C. V. KERN, Sheriff, et al Defendant	X	

PETITIONER'S FIRST AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, HARRY LEE WILLIAMS, Petitioner, in the above cause, by counsel, who has been appointed by the Honorable Carl Bue, and files this its Petition for Writ of Habeas Corpus and to that end would respectfully show that Petitioner seeks, in this Court of equity, to inquire into the legality of the restraint of Petitioner's personal liberty, as follows:

I.

Petitioner has discovered, since the institution of this suit, that Plaintiff

has been transferred from the custody of C. V. KERN, to Mr. George Beto, and/or his successor, at the Texas Department of Corrections in Huntsville, Texas. Plaintiff would therefore request service to be made upon said custodian forthwith.

II.

That, HARRY LEE WILLIAMS, is imprisoned and restrained of his liberty by virtue of a commitment for ten (10) years, resulting from a conviction on November 9, 1970, in Cause No. 151,738; State of Texas vs Harry Lee Williams; In the 177th District Court of Harris County, Texas, which conviction was appealed by appointed counse, the undersigned attorney, to the Court of Criminal Appeals of Texas, Cause No. 44,545, which Court of Criminal Appeals affirmed said conviction, and overruled Petitioner's Motion for Rehearing on March 22, 1972.

III.

First Ground

Petitioner would show that the Trial Court committed fundamental error and the Texas Court of Criminal Appeals' failure to correct same being error,by its failing to direct that Petitioner wear something other than Harris County Jail clothes [fol. 70] during his jury trial. The fact that Petitioner was tried in jail clothes infringed his fundamental right of presumption of innocence.

Facts

Although Petitioner made no in Court objection (the Trial being prior to the holding in Hernandez v. Beto), the District Attorney told the jury panel:

> "this Defendant is sitting in jail clothes" (R 45 L 19).

Both of the State's principle witnesses pointed out Defendant as wearing a white uniform (R 108 L 17 and R 141 L 21). The

record shows that Defendant told the Court that he was in jail during trial (R 241 L 3) and that he was in street clothes on the night of the arrest (see picture R 243).

Petitioner would rely on Hernandez v. Beto, 443 F2d 634, 637 (5th Cir 1971) which declares that to try a Defendant in his prison garb infringes his fundamental right of presumption of innocence:

> "The record makes it abundantly clear that no objection was lodged by counsel to the prison garb worn by Hernandez because, at the time, it was common practice to try prisoners held in jail in their prisoner clothing, and that a motion for a change of attire, in counsel's opinion, would have been denied as frivolous." Hernandez, p 636.

Petitioner would show that his case and that of Hernandez were tried in the same courthouse within a few months of each other, in the same district, under the same procedure and practices.

The 5th Circuit went on to cite the rather obsolute language in Brooks v. Texas, 381 F2d 619, 624 (5th Cir. 1967) where it said:

> "It is inherently unfair to try a Defendant for a crime while garbed in his jail uniform, especially when his civilian clothing is at hand."

The Court continued in Hernandez:

> "under these circumstances we cannot equate the inherent unfairness of being tried in prison garb with harmless error. [fol. 71] The probable impact on the jury of Hernandez' appearance in the Courtroom makes it impossible for us to declare a belief that it was harmless beyond a reasonable doubt." (at p 637).

The case at bar and the Hernandez case are one and the same in regard to the prison garb issue. Further, Garcia v. Beto, ____F2d____ (No 71-1383 5th Cir) is not applicable here because the defense did not try to prove how long Defendant

had been in jail as a means to elicit sympathy from the jury. The State mentioned Defendant's prison garb first, and Defendant did what he could to minimize the harm done to the presumption of innocense. Counsel was well aware that all prisoners in the 177th District Court of Harris County, as well as every single other Court of Harris County, were tried in prison clothes prior to Hernandez v. Beto, which was handed down while this case was pending before the Texas Court of Criminal Appeals.

Further, Petitioner would show that nowhere does the record show that Defendant intelligently waived the fundamental right of presumption of innocence.

IV.

Second Ground

Appellant would further show that Defendant was denied the assistance of effective and competent counsel.

Petitioner was declared and certified an indigent by the Trial Court long before trial and appointed an attorney for trial purposes, and later appointed present counsel for purpose of appeal. It should be assumed from the state of the record, that trial counsel was appointed since nothing shows otherwise. This Petitioner should, therefore, come within the rule stated in Rodriguez v. State, 340 SW2d 61 (Tex Crim App) where it was declared the Trial Court had the burden and duty to see that trial counsel has the ability to protect the rights of the Defendant. Trial counsel did not make a single objection to the avalanche of seriously objectionable testimony and evidence; nor did he make any objection to the Court's charge or press for the submission of a self defense issue; and Trial counsel failed to [fol. 72] call a single witness for the defense. Such inaction by the trial counsel can be

none other than ineffective counsel as the rule was laid down in Vessels v. State, 432 SW2d 108, 116 (Tex Crim App).

V.

Petitioner would show he has exhausted his state remedies, in that he raised both of these issues before the Texas Court of Criminal Appeals in his written brief, along with three (3) other points of error, and again in his Motion for Rehearing. To substantiate same, Petitioner hereby makes request of the Texas Court of Criminal Appeals to deliver the record, or a copy of same, of the said appeal, available to this Honorable Court, and that such be free of charge to Petitioner for the reason that he is indigent and has been from the commencement of this entire cause, which allegation is supported by attached affidavit.

Further, Petitioner requests appointed counsel for purposes of the

Writ Hearing.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Petition be set for Hearing and grant a Writ of Habeas Corpus for the purpose of setting an evidentiary hearing to determine the legality of the restraint of said Petitioner; and upon final hearing hereof, that this Honorable Court order Petitioner's release or retrial on this cause in accordance with law; and further, if this Petition be denied after a hearing, that the Court, pursuant to Rule 52(a), file its Findings of Fact and Law.

Respectfully submitted,

TIPTON, BISHOP & COMPANY

By s/ BEN L. ADERHOLT
BEN L. ADERHOLT
Attorney for
Petitioner
608 Fannin,
Suite 1500
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77002
223-4644

APPOINTED COUNSEL
BY STATE OF TEXAS
FOR STATE APPEAL

[fol. 73-76] * * *
[fol. 77]

CIVIL ACTION NO. 72-H-432

* * *

IN THE

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

* * *

HARRY LEE WILLIAMS,
Petitioner

V.

C. V. KERN AND GEORGE J. BETO,
Respondent

* * *

RESPONDENT'S MOTION TO DISMISS AND ANSWER

* * *

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes C. V. Kern, Sheriff of Harris County, and Dr. George J. Beto, Director of the Texas Department of Corrections, and makes this Motion to Dismiss

and Answer in the above numbered and entitled cause. Petitioner Williams is presently in custody of the Texas Department of Corrections in Huntsville, Texas, and therefore Sheriff Kern is not a proper party for this cause.

I.

Respondent denies each and every allegation of fact made by Petitioner, except those facts supported by the record and those specifically admitted herein.

II.

Petitioner Harry Lee Williams was convicted of assault to murder in the 177th District Court of Harris County, Texas, on November 9, 1970, after a plea of not guilty (Cause No. 151738). [fol. 78] He was sentenced to 10 years in the State Penitentiary. Appeal was taken to the Texas Court of Criminal Appeals which affirmed the conviction. Williams v. State, 477 S.W.2d 24 (Tex.Crim. 1972). Petitioner's Motion

for Rehearing was overruled on March 22, 1972.

III.

This Court has jurisdiction of the subject matter and the parties herein, pursuant to 28 U.S.C., Section 2241 et seq.

IV.

Petitioner in this cause alleges that he was tried in jail clothes, which infringed his fundamental right of the presumption of innocence. Also, Petitioner claims ineffective representation of trial counsel.

V.

Petitioner bases his first ground (i.e. regarding his being tried in jail clothes) almost entirely on the Fifth Circuit's opinion in Hernandez v. Beto, 443 F.2d 634 (5th Cir. 1971). However, a careful reading of Hernandez indicates that the decision does not automatically

support the position which Petitioner is asserting in the present cause. As opposed to the facts of Hernandez, the record in the present case does not make it abundantly clear that the reason why counsel failed to object to the jail uniform worn by Petitioner was because he felt it would be frivolous. Obviously the fact that Hernandez and the present case were tried in the same courthouse within a few months of each other in no manner affects the present habeas corpus cause.

Under these circumstances the present case differs factually from Hernandez. As noted in a Fifth Circuit case decided subsequent to Hernandez:

> "This Court has stated that it is inherently unfair to try a defendant in prison garb [citing Brooks v. Texas, 381 F.2d 619, 624 (5th Cir. 1967], but [fol. 79] that each case must be considered in its own

> factual context to determine whether the conviction from such trial must be set aside [citing Hernandez]." Garcia v. Beto, 452 F.2d 655 (5th Cir. 1972).

In the present case, there are indications that the Petitioner had knowingly waived his right to be tried in civilian clothes. As noted by the Court in its opinion on a Petition for Rehearing in Hernandez, some burden must be placed on the Defendant and his attorney to make known that the Defendant desires to be tried in civilian clothes before the State can be held accountable for his being tried in jail clothes. At page 637 the Court states:

> "A defendant may not remain silent and willingly go to trial in prison garb and thereafter claim error."

As noted above the present cause differs from Hernandez in that there is no indication that trial counsel's failure to object was not grounded on the reasoning that he felt any such objection would be

frivolous.

The trial record indicates that no objection was raised by Petitioner or his counsel concerning his being tried in jail clothing. In the absence of an affirmative showing that an objection was made in the trial court and overruled, a presumption of waiver of any constitutional right to be tried in civilian clothing should exist. The language in Johnson v. Zerbst, 304 U.S. 458, 468-469,58 S.Ct. 1019, 1025 (1938) cited with approval the Fifth Circuit case of Nash v. United States, 342 F.2d 366 (5th Cir. 1965). Although referring to the denial of any alleged constitutional right, including the jail clothing issue as here alleged:

> "It must be remembered, however that a judgment cannot be lightly set aside by collateral attack, even on habeas corpus. When collaterally attacked, the judgment of a court carries with it a presumption of

> regularity. Where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of habeas corpus, the burden of proof rests upon him to establish that he did not completely and [fol. 80] intelligently waive his constitutional right to assistance of counsel." (Emphasis added.)

Where, as in the language quoted, the burden is on Petitioner when he was tried without counsel, even greater is the compulsion to place the burden on Petitioner where he did have the assistance of counsel at the time objection should have been raised, as is here the case. See also Hawk v. Olson, 326 U.S. 271, 66 S.Ct. 116 (1945); Walker v. Johnston, 312 U.S. 275, 61 S.Ct. 574 (1941). The Texas Court of Criminal Appeals considered this ground on direct appeal and is in accordance with the above authorities.

Finally, Respondent's position is that any prejudice that could have been caused by Petitioner's being tried in jail clothes would have been harmless. The fact that State's witnesses identified the Defendant as wearing a "white uniform" was not fundamentally prejudicial, particularly where the Defendant was in plain view of the jury at all times and when no objection to this type of identification was lodged. The same holds true with the referral made by the District Attorney to the jury panel (R. 45), as he was merely cautioning the prospective jurors against any prejudice which might be caused from this obvious situation.

In addition, the case against Petitioner was quite strong. There were three eyewitnesses who testified for the State and who gave damaging testimony (R. 143, 172-173, 186-197), as

well as testimony from the victim of the assault. (R. 116-117). This aspect along with the above circumstances should be sufficient to allow this Court to hold that Petitioner's being tried in jail clothes was "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967); Hernandez, supra at 637. See Klingler v. Erickson, 328 F.Supp. 674 (S.D.S.Dak. 1971).

VI.

Petitioner's second ground concerns ineffective assistance [fol. 81] of trial counsel. The Court of Criminal Appeals also considered this point on direct appeal. At page 27 of the Court's opinion this matter is thoroughly analyzed, and Respondent adopts this language as properly disposing of the issue:

". . . He [Petitioner Williams] complains that trial counsel made only one objection during the trial and made no objections to the court's charge, introduced no evidence on self-defense and did not subpoena a witness thought necessary by the appellant.

"The record shows that counsel had the case postponed from July 15, 1970, to November 9, 1970. Counsel questioned the jury panel extensively on voir dire and cross-examined each of the State's witnesses attempting numerous times to raise the issue of self-defense. He was, however, unsuccessful in getting anyone to support his theory that Neatherlin was the agressor. In his jury argument he argued that the facts showed no intent to kill and even attempted to argue self-defense. The record as a whole shows "[t]he trial could not be classified as a farce or mockery of justice which was shocking to the conscience of the Court, or one where the purported representation was only perfunctory, in bad faith, sham, pretense, or without adequate opportunity for conference or presentation." Thompson v. State, ___ S.W.2d ___ (No. 44,071,

November 2, 1971.

"We conclude that appellant's contention is without merit."

None of the allegedly incompetent acts of trial counsel [failure to object to evidence or the Court's charge; failure to press for a submission of the issue of self-defense; failure to call any defense witnesses (R. 271)] are shown by the record to have denied Petitioner of effective assistance of counsel. See Williams v. Beto, 354 F.2d 698 (5th Cir. 1965); Moore v. Beto, 458 F.2d 386 (5th Cir. 1972); United States ex rel. Marcelin v. Mancusi, 462 F.2d 36 (2d Cir. 1972); Hegwood v. Swenson, 344 F.Supp. 226 (W.D.Mo. 1972).

WHEREFORE, PREMISES CONSIDERED, Respondent prays that the application for writ of habeas corpus be dismissed, or in the alternative, denied.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of
Texas

[fols. 82-185] * * *

[fol.1]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HARRY LEE WILLIAMS, Plaintiff	X	
VS.	X	CIVIL ACTION NO. 72-H-432
C.V. KERN and DR. GEORGE BETO, et al, Defendants.	X	

* * * * *

[fols. i,ii] * * *

REPORTER'S TRANSCRIPT OF PROCEEDINGS

[fol.2]

A P P E A R A N C E S

For the Petitioner:

Messrs. Tipton & Bishop
1500 Texas Professional Tower
Houston, Texas

By: Ben L. Aderholt, Esq.

For the Respondent:

Attorney General's Office
2603 Carlow Drive
Austin, Texas

By: E. Bruce Curry, Esq.

[fol.3]

P R O C E E D I N G S

THE COURT: This morning's case is 72-H-432, a case of writ of habeas corpus, Harry Lee Williams vs. C. V. Kern, Dr George Beto, Director, et al.

What says counsel for the petitioner?

MR. ADERHOLT: Petitioner is ready, Your Honor.

THE COURT: Counsel for the respondent?

MR. CURRY: We are ready, Your Honor.

THE COURT: Very well. In order that the record may be clear, I'm going to ask that each of you state in capsule form, taking no more than a couple of minutes to summarize what it is that we are doing here this morning, what your respective positions are and what you expect to prove. Mr. Aderholt.

MR. ADERHOLT: Yes, Your Honor. I am counsel for petitioner, and we have filed an application for writ of habeas corpus for relief based on the recent rulings of the [fol.4] Fifth Circuit in Hernandez vs. Beto, which held that the trial of a defendant in a criminal trial before a jury was fundamental error. We will prove that the petitioner was tried in jail clothes against his will, and we will have two witnesses, the defendant himself and his counsel at time of trial. And we will, in argument, if the Court desires it, try to show the history of the cases from Brooks down to Thomas, which is the most recent Fifth Circuit case.

THE COURT: Very well, thank you. Mr. Curry.

MR. CURRY: Your Honor, respondent takes the position in this case that the Hernandez doctrine as originally laid out

by the Fifth Circuit is no longer the absolute language as it was once originally proposed. Since the time of Hernandez, many Fifth Circuit cases have come down, all of which have chipped away at the original Hernandez doctrine, and in today's hearing we will attempt to show that no relief should be granted on the jail clothes issue, because there was a waiver of any objection to the [fol.5] jail clothes issue, and also, in the alternative, that there was obviously harmless error involved in accordance with the Beto vs. Thomas decision.

THE COURT: What do you view the test to be today?

MR. CURRY: Well, excuse me, Your Honor, I --

THE COURT: Hernandez was a broad holding, and you say that subsequent cases have chipped away.

MR. CURRY: Yes.

THE COURT: Where are we today?

MR. CURRY: Your Honor, I feel today that due to the Fifth Circuit decision, primarily in Garcia and in Thomas, that we have opened up areas such as trial tactics by the trial counsel, and --

THE COURT: We don't have that, do we?

MR. CURRY: I don't believe so, Your Honor, not in this case.

THE COURT: Garcia really isn't in this case. Now, what does Thomas do?

MR. CURRY: Thomas states it [fol.6] where the evidence was overwhelming so that a jury could find no other way but in their verdict of guilty that the error, if any, was harmless beyond all reasonable doubt. Under the Chapman and Herrington cases, these two decisions have been created by the Fifth Circuit subsequent to Hernandez, and we submit also that there is the waiver situation, the direct waiver situation, and this is

present in the current case that we are talking about this morning.

THE COURT: All right, thank you. Mr. Aderholt, call your first witness.

MR. ADERHOLT: Your Honor, at the outset we would like to introduce the transcript of the State trial record, and I believe the Clerk has the original of that document. If not, I will submit a copy, a Xeroxed copy.

THE COURT: Very well, the transcript of the State Court proceeding will be given a number.

MR. ADERHOLT: Very well.

THE COURT: Petitioner's Exhibit No. 1?

[fol.7]

MR. ADERHOLT: Yes, Your Honor.

THE COURT: All right, it's admitted.

(The document referred to was marked "Petitioner's Exhibit No. 1" and was received in evidence.)

MR. ADERHOLT: We refer to Plaintiff's 1 as the State of Texas -- the transcript of the State of Texas vs. Harry Lee Williams under Cause No. 151, 738 in the 177th District Court of Harris County.

THE COURT: All right.

MR. ADERHOLT: We would also, Your Honor, offer the depositions which were taken pursuant to written interrogatories, pursuant to Rules 31 and 32; Mr. Marion Sanford, Clarence Kendall, Mr. C. H. Neal Duvall, Mr. D. Wayne Walker and James Weir.

THE COURT: You want them identified separately or as one exhibit?

MR. ADERHOLT: I think we should probably have them separate, Your Honor, since some of the answers are different.

THE COURT: All right. Designate [fol.8] for the record which one is which. Do you have an objection to these?

MR. CURRY: The only objection I have is I have never seen a copy of these answers. I was served with the notice of the depositions themselves, and I would request that I see the answers.

THE COURT: When were they filed?

MR. ADERHOLT: I'll have to check.

MR. CURRY: I believe the 31st of May is when I received notice.

MR. ADERHOLT: They were timely filed, and if the Clerk has the originals -- they have been filed.

THE COURT: July 5, 1973 is the date of filing. Were not copies sent to --

MR. ADERHOLT: Yes, Your Honor.

THE COURT: -- counsel for the respondent?

MR. ADERHOLT: Yes, sir, I believe the certificate is found in -- Mr. Thomas Pletcher certifies that --

THE COURT: You filed no cross interrogatories, Mr. Curry?

[fol.9]

MR. CURRY: No, Your Honor. I did obtain affidavits from certain of these people in expectation of these answers but I did not file cross interrogatories.

THE COURT: Very well, they will be admitted. If you will give them precise numbers, Mr. Aderholt.

MR. ADERHOLT: Yes, sir.

THE COURT: So, that the record is clear.

MR. ADERHOLT: That of Mr. Clarence Kendall will Be Plaintiff's 2, Mr. Marion Sanford will be three, Mr. James Weir will be Plaintiff's 4, Mr. Wayne Walker will be Plaintiff's 5, and Mr. Duvall will be Plaintiff's 6.

THE COURT: All right, they will be admitted.

(The documents referred to were marked "Petitioner's Exhibits 2,3, 4,5 and 6", and were received in

evidence.)

MR. ADERHOLT: At this time, we would ask the State if it would stipulate to the docket entries of the Clerk of the [fol.10] 177th District Court as to those cases that were on the docket during the month of October and November. We have an affidavit from the Court Clerk certifying that the cases that were on the docket during the month of October and November.

MR. CURRY: No objection, Your Honor.

THE COURT: All right.

MR. ADERHOLT: I ask that the Clerk's affidavit certifying the docket be marked and accepted as Plaintiff's 7.

THE COURT: Plaintiff's Exhibit No. 7 is admitted.

(The document referred to was marked "Petitioner's Exhibit No. 7" and was received in evidence.)

MR. ADERHOLT: We would call Mr.

Chester Darnell as the Petitioner's first witness.

THE COURT: Raise your right hand to be sworn, please.

(Witness sworn.)

[fol.11]

CHESTER E. DARNELL,

called as a witness in behalf of the petitioner, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ADERHOLT:

Q State your full name to the Court, please, sir?

A Chester Earl Darnell.

Q Mr. Darnell, are you an attorney licensed under the State of Texas to practice law?

A Yes, I am.

Q And how long have you been so licensed?

A 1961.

Q Since 1961?

A Yes.

Q Mr. Darnell, were you counsel on November the 9th, 1970 in the State of Texas vs. Harry Lee Williams in the 177th District Court for Mr. Williams?

A Yes, I was.

Q Were you present during the whole trial?

A Yes, I was.

Q Did you have co-counsel?

A No, I did not.

Q So, you were in charge of the defense from beginning to end for Mr. Harry Lee Williams?

[fol.12]

A That is correct.

Q Did you see Mr. Williams appear before the jury in that trial?

A Yes, I did.

Q What was his appearance? What did he have on?

A He had on what is referred to as jail garb, it's the white uniform that the persons that are incarcerated at the Rehab Center wear.

Q Okay. Did he appear before the panel during time of voir dire and during the trial in principal before the jury?

A Yes, he did, that's what he wore during the entire trial.

Q Did he change clothes at all during the time of the entire proceeding?

A The garments may have been changed but they were the same type.

Q Did you hear the attorney for the State of Texas -- rather for -- yes, the District Attorney, refer to the defendant being in some sort of jail clothes?

A Yes, I recall Mr. Jim Skelton

mentioning that he was in jail clothing, or something to that effect.

Q Did you allow this -- did you intend Mr. Williams [fol.13] to remain in jail clothes as a trial tactic?

A No, I did not.

Q Did you intend the jury to -- this fact to elicit any sympathy from the jury?

A No, sir.

Q I'll ask you, if you -- when was the first time that you heard of the Hernandez decision, was it before or after this trial?

A It was after this trial.

Q I would ask you if we had, for purposes of a hypothetical question, a man that would be charged with the same crime as Mr. Williams was, the same facts, same identical circumstances, and he were in a suit, had a tan, was clean, made a good appear-

ance before the jury, and compare that to Mr. Williams' actual appearance before the jury in his case, and ask you if there could be any impact upon the jury's mind of the appearance of such to defendants?

A Yes, there could.

Q Do you think that this would affect the jury's view of this man's innocence?

A It could. Individual people think differently. It could make an impact upon them. [fol.14]

Q Mr. Darnell, were you ever conscious of waiving the right to have Mr. Williams tried in civilian clothes?

A No, sir.

Q So, if I were to ask you if you intelligently and knowingly waived the right to be tried in civilian clothes Mr. Williams' right to be tried in civilian clothes, would you say that this was not your intention?

A It was a practice in the Court to try people that appeared in jail garb in jail garb. When they appeared in jail clothing, they normally were tried as that.

Q Did you ever have any kind of experience along this line previously?

A Well, in the case of State vs. Otis Lee Hopson, Tom Berry and I were counsel for Mr. Hopson, and that was in Judge Wendell Odom's Court, prior to the trial, on Sunday, we went to the Rehab Center and discussed with the Deputy Sheriff about Mr. Hopson appearing in his civilian clothes and were told that he would. At the time of trial, Mr. Hopson had on his jail garb. Mr. Berry and I mentioned that to Judge Odom and he [fol.15] informed us that the jury panel was on its way down and he remarked something to the effect, "That you boys better

be ready." And we proceeded to trial, and he was in jail garb, and it appeared to me that when people appeared in that garb, they usually went to trial in whatever they had on.

Q This was prior to Hernandez, prior to the handing down of the Hernandez decision?

A Yes, sir.

Q I'll ask you then, Mr. Darnell, if you thought that the same practice did apply in Judge Love's Court as far as your past experience is concerned?

A I thought that it applied in all the Harris County Courts.

Q So, you did not object because you thought the practice was that all these -- that the Judge would probably have ruled as Judge Odom did, you were to proceed in jail clothes?

A That is correct.

MR. ADERHOLT: Pass the witness, Your Honor.

THE COURT: All right, cross examine.

[fol.16]

CROSS EXAMINATION

BY MR. CURRY:

Q Mr. Darnell, did you state that you were court appointed in this trial?

A No, I did not.

Q Were you court appointed?

A No, I was not.

Q You were retained?

A By Mr. Williams, yes.

Q All right, and did you state that you were licensed in 1961, is that correct?

A Yes.

Q Can you tell the Court approximately in some manner how many criminal cases you had handled prior to this 1970

trial, approximate estimation?

A Well, I practiced general law, I have some civil and some criminal, I don't know the approximate number. I had been in Judge Love's Court before prior to this time.

Q All right. In the present case, what was Mr. Williams charged with?

A Assault with intent to murder.

Q All right. Did you investigate this trial? Investigate the facts surrounding this matter prior to trial?

[fol.17]

A I talked with Mr. Williams at the Harris County Jail downtown on a number of occasions, I don't recall, but it was more than one, and I visited with him and talked with him at the Rehab Center on a number of occasions. And I reviewed the fact situation with Mr. Jim Skelton, the

District Attorney, as to -- well, what his feelings were as to what he was going to try to get at the time of trial, you know, if the defendant were found guilty and the number of years.

Q All right. After you had completed your investigation and at the time of trial, what type of defense did you offer in the defendant's behalf?

A During the trial, the question as to whether he was defending himself, self defense, and cross examination of the witnesses that Mr. Skelton had put on, I attempted to bring out the point that he was defending himself. Mr. Williams did not testify at the trial, but in my cross examination, there were two witnesses that I calculated that I could bring that point out better than some of the others. Mrs.

Williams, who was a German citizen, had [fol.18] not been here too long, was one, and -- I can't recall the other lady's name offhand.

Q In your opinion did you succeed?

A From the results I did not.

Q Did you attempt to have a charge submitted on self defense?

A I discussed that with Mr. Skelton and Judge Love. Judge Love was of the opinion that there was no evidence submitted at the time of trial that would bring up that issue.

Q All right. Mr. Darnell, you have stated that the defendant did not take the stand in his trial, exactly why didn't he take the stand, do you recall?

A Well, that's something that he would have to answer to why he did not.

Q All right. Did you advise him in

any respect, pro or con, as to taking the stand and testifying?

A Well, at the conclusion, after Mr. Skelton rested, it appeared that the greater weight were against him, which it would be at that point, he could get on the stand and testify in his defense. He had on jail garb and he said he just didn't want to get on the stand [fol.19] at that time, he did not want to.

Q Then, is it your testimony that you advised him that he probably should take the stand at that time if he was going to take it?

A Well, I gave him what my opinion was as to the weight of evidence that had been submitted.

Q Did you prevent him from taking the stand, did you in any respect?

A No, sir.

Q Okay. And is it your testimony that in your opinion this was the only method of establishing self defense at this period due to the absence of other witnesses, or any overwhelming evidence in favor of the self defense issue, is that correct?

A The person that could best testify to that would be Mr. Williams at that time. The other witnesses had not testified that it was self defense.

Q That's what I was asking you. In your opinion, at that time, was the only way you felt you could get the self defense issue before the Court was to have Mr. Williams testify? Was that your opinion at that point in the trial?

A Well, the trial had been concluded before that [fol.20] issue was sub-

mitted to the Judge.

Q I'm talking about at the time when the State rested, at that point did you feel that you could get the self defense issue before the Court in any other manner than by having the defendant himself testifying?

A No, sir.

Q Okay. I believe you've testified that the defendant was tried in jail clothing. Did either you or the defendant raise any objection or in any other manner attempt to request that the Court allow the defendant to have the opportunity to be tried in civilian clothing?

A No, no objection was made to the Court.

Q All right. Is there any particular reason why you did not object other than your past experience in another Judge's Court?

A Well, I felt it would be futile to object, everyone else was being tried in jail clothes and he was ready for trial, so whatever he had on, we went to trial.

Q Mr. Darnell, your statement, "everybody was being tried in jail clothes," what did you base that on other than your one prior occasion?

A Well, the other prisoners that came in -- I say [fol.21] everybody, I probably should correct that, other individuals had on jail garb in Court and were being tried in jail garb, or appearing before the bench the same as Mr. Williams did. I mean, he was not the only person that was before the Court that had on jail garb.

Q Were you personally aware of this taking place in Judge Love's Court?

A I observed that there were other individuals that had jail garb on that were appearing in his Court.

Q Did you ever see any of the individuals or their attorneys object to the wearing of jail clothing and have it overruled by the Court?

A Not during this trial, or not during this period when we were in Court, no, sir.

Q Ever? Have you ever seen this in Judge Love's Court?

A No, sir.

Q Your Honor, at this time I'd like to have the certificate of Judge Love marked and introduced into evidence. I believe the Clerk has a copy.

THE COURT: All right.

MR. CURRY: I mailed it in as a supplemental answer, I believe. Your [fol.22] Honor, I believe I filed this

certificate earlier with my amended answer in this cause, I have a Xeroxed copy of the certificate with me, but --

THE COURT: Take the Xeroxed copy, and unless counsel has some objection, we can move along.

MR. ADERHOLT: Yes, I've seen this. Your Honor, we are going to object to it on the basis we have been afforded no opportunity for us to cross examine. This is absolutely hearsay and would be self-serving.

THE COURT: It will be overruled.

MR. CURRY: This is Respondents' Exhibit 1.

THE COURT: All right.

(The document referred to was marked "Respondent's Exhibit No. 1" and was received in evidence.)

Q (Continuing) Mr. Darnell, I am holding a certificate which has been executed by Judge Myron A. Love, Judge, 177th District Court, executed -- notarized on March 6, 1973. [fol.23] This certificate, in effect, states that his -- the Judge's policy has been to allow any person tried in his courtroom in jail clothing who objected or requested civilian clothing to have the opportunity to be tried in civilian clothing, and in fact, I believe Judge Love even states that he would attempt to furnish a defendant with civilian clothing if they were not available in any other manner, and also states that this has been done on prior occasions in his Court.

Now, is it your testimony that you were completely unaware of any such policy in Judge Love's Court?

A I had never seen that come up when I was in his Court that anyone requested and put on civilian clothing, changed from the jail garb.

Q But you never requested this of Judge Love in this particular trial, is that correct, you never asked?

A That is correct.

Q Okay. And I believe you stated that the reasons you didn't object was because you considered it futile, is that correct?

A That is correct.

[fol.24]

Q Mr. Darnell, is there any way this can be aligned properly with your statement that you were not aware of Judge Love's policy? In other words, how could you think something was futile if you had no idea one way or the other about the particular Judge's policy?

A I had not discussed his policy with him. As I stated earlier, in Judge Odom's Court, the policy apparently was that he appear in jail clothing, you're going to trial, you're going to trial.

Q And you assumed Judge Odom's rule applied to Judge Love's rule?

A I assumed since so many people appeared in jail garb and were being tried in Harris County Courts, it appeared to be a policy, if that's the way they arrived, that's the way they were tried. I had cases that people had on civilian clothes, and also jail garb and had gone to trial.

Q Mr. Darnell, a moment ago, also you stated in your opinion, I believe on a hypothetical situation, or anyway your opinion, that anyone tried in jail clothes was prejudiced

and you would in any case rather have the person tried [fol.25] in civilian clothing, is that correct?

A It could make an unfavorable impression upon some jurors, and if he has got on civilian clothing, well that possiblity would be eliminated.

Q Okay. Your, Honor, at this time I would like to -- well, have this marked as Respondents' Exhibit 2. This is an affidavit from Mr. Marion Sanford, Jr., who is one of the attorneys who answered the interrogatories propounded by the petitioner, only for the statement therein that in his opinion trying a person in jail clothing had no effect upon the jury in the cases which he had tried, only for this purpose.

MR. ADERHOLT: Object, Your Honor. If he wanted to get such statements from counsel he could

have gotten them through cross interrogatories.

THE COURT: This is a non-jury case and it will be given appropriate weight. I'll permit it to be introduced. Defendants' Exhibit 2 you're offering now? [fol.26]

MR. CURRY: Yes, sir.

MR. ADERHOLT: Your Honor, I want to make sure my objection is entered in the record that this is hearsay and not --

THE COURT: Your objection is noted.

MR. ADERHOLT: Thank you, Your Honor.

THE COURT: It will be admitted.

(The document referred to was marked "Respondents' Exhibit No. 2" and was received in evidence.)

MR. CURRY: Your Honor, also at this time, could I have these marked as Defendants' 3 and 4?

At this time I have what is marked Respondents' 3 which is an affidavit signed by Mr. Clarence Kendall, and Exhibit No. 4 which is an affidavit signed by Mr. James L. Weir, both of whom were attorneys who answered Petitioner's written interrogatories. These affidavits [fol.27] were, as I stated earlier, obtained by me in lieu of answers to the written interrogatories, and for that purpose I would like to submit them.

THE COURT: All right. Have you seen these, Mr. Aderholt?

MR. ADERHOLT: No, Your Honor, I haven't seen any of these affidavits

THE COURT: All right.

MR. ADERHOLT: Your Honor, I would offer the same strong objection to these, they're not propounded according to the rules as counsel for the petitioner has tried

to do, and further, this does not afford me any opportunity to cross examine these witnesses, these statements.

THE COURT: Mr. Aderholt, I'm fully aware of what you say. They will be admitted and given appropriate weight.

MR. ADERHOLT: Thank you, Your Honor.

(The documents referred to were marked "Respondents' Exhibit [fol.28] No. 3" and "Respondents' Exhibit No. 4" and were received in evidence.)

MR. CURRY: That's all the questions I have.

THE COURT: All right, will there be any redirect?

MR. ADERHOLT: I'll just point out to the Court that Judge Love does not say in his certificate that he would

furnish clothes. I think counsel probably referred to that by mistake.

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REDIRECT EXAMINATION

BY MR. ADERHOLT:

Q Mr. Darnell, just one question, who was Miss Tolly?

THE COURT: Miss who now?

Q Miss Tolly, T-o-l-l-y. Miss Tolly, was she not a girlfriend or female friend of Mr. Williams as far as you know?

A As I recall, Miss Tolly was a lady that come in from Illinois, and Mr. Williams went by the [fol.29] airport and gave her a ride to the apartment complex. He knew Miss Tolly, was acquainted with her, and I think had worked at a photographic company with her. She was at this apartment complex when this incident took place. I discussed with W. B.

Thornton, who was the man that Mr. Williams had worked for and was acquainted with Miss Tolly, and Miss Tolly left shortly after that and went back to Illinois. At the testimony of the trial, as I recall, it was stated that she had gone to Kansas or some place, but she was a lady that was present when this incident occurred.

Q From your investigation of the facts and also from the testimony adduced in the trial, was it your opinion that there was probably a love triangle between the defendant, Miss Tolly, and the complaining witness, Mr. Netherland?

A Well, I did not approach that on the basis -- what you say may be true, that was not something that I was considering that there may have been a love triangle.

Q Do you know whether at all this fight

that the crime arose out of developed partially over [fol.30] her, or do you remember?

A Well, as to why the fight occurred, it's difficult to say. The testimony at the trial was it started over some checks that were made by someone other than Mr. Williams. When Mr. Williams was approached about the rent --

Q Those checks had been paid prior to this time, also, were they not?

A As I understand Mr. Williams had given the checks to Mr. Netherland, but Mr. Williams was not the maker of those checks, he did not originally write them.

MR. ADERHOLT: We have no further questions.

THE COURT: Any further examination?

MR. CURRY: No, Your Honor.

THE COURT: All right, you may step down.

Call your next witness.

MR. ADERHOLT: Call Mr. Williams, Your Honor.

THE COURT: All right. Mr. Williams.

(Witness sworn.)

[fol.31]

HARRY LEE WILLIAMS,

the petitioner, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ADERHOLT:

Q State your full name to the Court?

A Harry Lee Williams.

Q You are the same Mr. Williams that was the defendant in the case in which Mr. Netherland was the complaining witness?

A Yes, sir.

Q And you have heard the testimony of

Mr. Darnell up to this point?

A Yes, sir.

Q And was Mr. Darnell your counsel during the trial --

A That's true.

Q I would ask you, Mr. Williams, whether or not you were tried in a prison uniform?

A I were. I had on white dungarees, they were too large for me, and I had on a pair of those shower slippers about that long (indicating), and they had "Jail" stamped across the back and on the legs.

Q Okay. Do you remember what other people, other [fol.32) defendants had on --

A Everyone that was in the tank they dressed that out at the Rehab did have those kind of clothes on.

Q Was this true in the holdover tank behind Judge Love's Court?

A That's true, all of them had the same kind of clothes on. Now, I did ask for my clothes out there, that Capt. Cleveland, at the trial, had pressed for me, and they said wear them, everybody else is wearing them.

Q Now, you're saying -- what other clothes did you have?

A I had a pair of boots and a pair of trousers and a sweater out there, and I started to Court, and I asked about getting them. Mr. Cleveland, he was the Capt. Cleveland out there, I asked him would he have the trousers taken out and pressed for me and he said he would, and the date I started to dress, I asked for my clothes and they said, wear them, everybody else is wearing them.

Q What are they talking about wearing them?

A Wear them that had court stamped on the clothes.

Q Are you saying that you requested civilian [fol.33] clothes?

A They told me to wear them.

Q To wear what?

A To wear the -- I requested to wear my clothes and they handed me them others like everybody else was dressing out and I didn't have no difference, only to wear them.

Q Mr. Williams, do you think that you would have made a better appearance to the jury if you had on your other clothes?

A Well, you know, appearance goes a long way in the public, and I think if I would have been dressed different, why I would have -- they would have given the jury more impression than what they did have to go on.

Q I ask you, Mr. Williams, if you -- I

asked you a few questions about the complaining witness, Mr. Netherland, do you know whether he was -- you saw him at the trial, did you not, he was at the trial?

A Yes, sir.

Q Do you remember how heavy he was?

A Mr. Netherland weighed about 215 pounds and was 6'5", 6'3" or 6'4" tall and was around 36 years old.

[fol.34]

Q And do you remember how many people came up to you at the time of the fight?

A Well, Miss Dillon had called me to come and carry her -- I had picked her up the Sunday before at the airport on that Delta Airline at 3:45, brought her down to her apartment and she was going back, and she called me that day and asked me to come down here and get another bag

and see about a box to ship her mattress in.

Q My question is, how many people came up to you just at the beginning of this fight?

A Well, Kay came up and then right behind her, Mr. Netherland and this other fellow was coming right around the corner behind her, I was sitting on the porch talking to these women waiting on Kay to get back.

Q Okay. Did one of these men have a pistol?

A Mr. -- this Ray had it. He testified he had it behind him, he didn't, he had it in his left pocket, and Mr. Netherland had me by the arm where these scars is here, beating me. I never did get on the ground, I was trying to keep him from hitting me in the face, and he had this gun down there, but he wouldn't

stop them from beating me, and this officer testified all the hide was off my knees and left arm.

Q I'll ask you if you were afraid at the beginning of this fight?

A Naturally I would be, sir, because he was much bigger than I was, and the fact of business, I didn't think there was any trouble abrewing until he grabbed me by the arm and went to whipping. He first said, "Get away from her, you ain't going to carry Kay no where."

MR. ADERHOLT: Pass the witness.

THE COURT: All right, cross examine.

CROSS EXAMINATION

BY MR. CURRY:

Q Mr. Williams, did you or your counsel either object or request to the trial court, the Judge, to allow you to

wear civilian clothing at your trial?

A Well, I imagine the reason, sir, that everybody had them on --

Q My question was --

[fol.36]

THE COURT: Mr. Williams, answer the question that is asked, don't answer anything else. We will move along much more rapidly.

THE WITNESS: Thank you, sir.

THE COURT: Repeat your question.

Q (Continuing) Did you or your counsel request, make a request to the trial Judge that you be tried in civilian clothing?

A No, sir, there wasn't nothing said about it.

Q Do you know why there was nothing said about it, did you discuss this with your own counsel?

A Why I didn't say anything?

Q Yes, sir.

A Because all the other people coming out of the Rehab and was in the hold-over tank with me had the same kind of clothes on that I had on.

Q All right. And Mr. Williams, why didn't you take the stand and testify?

A Well, I didn't think I had any case in there, and I had a little trouble in about twenty-five years ago and I didn't want that to come out.

Q You had a prior record?

A Yes, sir, it was 1953.

Q Was that the primary reason why you decided

[fol.36]

not to take the stand?

A That's right.

Q Did your counsel attempt to prevent you in any way from taking the stand?

A He didn't -- he said. "You may have to

take the stand." I told him I didn't want to, and on the 10th when Mr. -- started the case on the 9th, and after they testified, this Mr. Netherland and this Ray testified, the police, the Judge Love asked was any more witnesses, and they both said no. He says, Court is recessed until 10:00 o'clock in the morning. That was November the 10th, and then when he, Mr. Netherland, come back that day, he had these women with him, but they more so testified for me, kind of testified to the truth. He went and talked to those women, lived in his apartment, and brought them with him on November the 10th, that's the date I was tried, not on the 9th.

MR. CURRY: That's all the questions we have, Your Honor.

MR. ADERHOLT: I have no further questions.

THE COURT: All right, you may

step down. Call your next witness.

(Witness excused.)

MR. ADERHOLT: That's all the witnesses we have, Your Honor, at this time.

I don't know the propriety of this, Your Honor, and I don't really know the law, the applicable law on this, but I would like to ask the Court to take judicial notice of the official reports of the cases that I have cited in my brief that have come from the Harris County Courthouse. In other words, the Hernandez, the Ellis, the Williams, the Simons, the Thomas, the Smith and ex parte Kelly cases. I believe the Court can take judicial knowledge of the official reports, the decisions, as they have been reported in the Southwestern and --

THE COURT: Mr. Aderholt, I have read your brief, I've read it twice. What is it outside of the holdings of the cases that you wish to point out?

[fol.38]

MR. ADERHOLT: Only that these men were tried in jail clothes, and I wish the Court to take judicial knowledge of the opinions in those cases, that these men were tried in jail clothes in Harris County. That's the gist of my offer.

THE COURT: All right.

MR. ADERHOLT: Thank you, Your Honor.

THE COURT: Anything further?

MR. ADERHOLT: That's all, Your Honor.

THE COURT: Are you ready to go forward?

MR. CURRY: I would like to call Mr. Jim Skelton, please.

(Witness sworn.)

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[fol.39]

JIM SKELTON,

called as a witness in behalf of the respondents, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CURRY:

Q Would you please state your full name for the record?

A Jim Skelton.

Q And your occupation?

A Lawyer.

Q How long have you been licensed in the State of Texas?

A Since September of 1967.

Q All right. Were you serving as prosecutor on the District Attorney's staff here in Harris County during November of 1970?

A Yes, sir.

Q Did you prosecute often before the 177th District Court, was this your Court, so to

[fol.40]

speak?

A I was the chief prosecutor and tried most of the cases in there.

Q How long did you serve or appear before the 177th?

A About a year and a half, I would say.

Q All right. And who was the Judge during this time?

A Myron Love.

Q All right. Was he the Trial Judge in the Harry Lee Williams case?

A Yes.

Q All right. Do you remember very clearly the circumstances of that 1970 trial?

A Yes, sir, fairly well.

Q And did you actually prosecute the entire trial?

A Yes, sir.

Q All right. Do you recall whether or not the defendant wore jail clothing in that trial?

A The only thing I recall, I remember on voir dire I asked the jury the fact he was in jail clothing would this prejudice the jury or not. I remember inquiring about that on voir dire examination, because I've had occasions

[fol.41]

when people wore jail clothes and sometimes they were sympathetic, and sometimes they were hostile. I made inquiry of the voir dire part whether anybody was prejudiced or against him because he was in jail clothes. I remember that, that he was wearing jail clothes and made that comment.

Q Okay. Who represented the defendant in the trial?

A Chester Darnell.

Q All right. To your personal knowledge as a prosecutor before this Court, did Mr. Darnell ever handle any other cases, criminal cases in 177 Court prior to this 1970 trial?

A This is the first case I had tried against Chester Darnell, I had seen him in there before, but as far as actual trials, this is the first one.

Q In your Opinion as a prosecutor, or to your knowledge, did Judge Love have any particular policy regarding the wearing of jail clothes as of the time of this 1970 trial?

A Yes, sir.

Q All right. And basically what was that policy?

[fol.42]

A If anybody ever made an objection we would permit people to bring up clothes and dress them out, let them use the jury room. In fact, one

instance, a defendant was tried in Judge Love's suit. This was prior to this. Judge Love lent him a suit, not the one he had on, he didn't go out in just his robe, he got another suit and lent it to the man. I remember this happened, and on several occasions we had people that came up that brought clothing from home and we permitted them to dress back in the jury room.

Q So, this policy had been carried out to your personal knowledge --

A Yes, sir.

Q -- on prior occasions. All right. To your recollection, did either the defendant or his counsel, Mr. Darnell, ever object to his wearing jail clothes or in any other manner request to the Trial Court that he be allowed to wear civilian clothes in the trial?

A No, sir, there as no objection made, and at no time nobody ever asked me to make any comment about him being in jail clothes.

Q And you stated what the Judge's policy was,

[fol.43]

I'll ask you, in your opinion, if such a request or objection had been raised in the Harry Lee Williams' trial, would Judge Love have granted such objection based upon his policy?

A Absolutely.

Q All right. Are you clear upon the actual facts involved, the evidence introduce, the testimony in this trial, do you remember them clearly?

A Yes, I remember the evidence itself quite well.

Q All right. Looking at the evidence in its entirety, was it your opinion that the evidence was such that you

might class this as a good State's case or a poor State's case?

A I think it would be a very good State's case.

Q Was it the type case could have gone either way? Are you saying it was a very, very strong case?

A I would have been very surprised if he had been found not guilty, because the injuries were quite severe.

Q Would you elaborate on what evidence you based this upon?

A Well, there were about three different things I think that stood out in my mind, at least,

[fol.44]

I talked to the jury, also, because at that time I still made a practice of calling on jurors to see what they think and the things that I thought about the case were strong. There was one man, I forgot his name, Ray

somebody, that was present with the complaining witness who testified that Mr. Williams held a knife like a knife fighter, whatever that's supposed to be, held the knife open with the blade across his index finger, and slashed several times like an experienced knife fighter. In fact, I think this man, Ray, had done some work in karate or judo, or something in the service, and he knew about this. This testimony came in the manner in which the knife was used.

Also, the testimony showed that during the trial that the complaining witness was not aware of the fact he was cut, and his intestines were hanging out, and he was ripped across the stomach. In fact, I think we showed the scars, I'm not certain if we did that or not, but I do know the man was holding his insides with his

hands, and those two factors, plus we had a number of witnesses

[fol.45]

that saw the whole transaction, plus it had occurred on property owned by the complaining witness, which made an impression upon the jury. He owned the apartment complex and had asked the man to leave. Those three factors, his property, the severe injuries and the method in which the injuries were inflicted, in my opinion made a very strong State's case.

Q Was Mr. Darnell, according to the facts available, able to present any defense, or what defense did he present?

A He did probably what I would have done had I been defending, he rested behind the State.

Q What do you mean by that?

A I've done that frequently, I've always felt -- I do nothing but criminal work now and defense work, and I never felt a -- I think what lawyers strive to do is overdo it and try to prove innocence, and that isn't their job as a defense attorney, and I think one of the smarter tactics a defense attorney can use is rest behind the State unless they have got something that they can come forward with.

In this particular instance, the only

[fol.46]

witness Mr. Darnell had that could possibly help him was a woman who moved out of the State and he had nothing else in my opinion. I would have done the same thing he would have done.

Q Okay. And why, in your opinion, was

the issue of self defense not brought forward in this trial, do you have any feeling on that?

A Yes, under the rules in the State Court, the only time self defense can ever be submitted to a jury is if an exculpatory statement is solicited by the prosecutor -- for example, if I was prosecuting and I asked a witness was it self defense, and this person said yes, this is an exculpatory statement and you're automatically entitled to self defense if the prosecutor brings it out through their witnesses. I did not do this, that didn't come into that viewpoint. The second time self defense is raised is when a defendant takes the stand and testifies he was in fear of his life, under an unlawful attack, and there was one instance under case law, I've never seen it done, and it's theoreti-

cally possible, is when the totality of the circumstances, a great number [fol.47] of the witnesses testify about the severity of the attack, and you more or less assume that the defendant was in fear of life.

In all cases I've tried, the only time we have ever submitted self defense is when a person took the stand and testified to the essential elements of self defense. There was actually no evidence in my opinion to submit the issue of self defense.

MR. CURRY: That's all we have, Your Honor.

THE COURT: All right, cross examine.

CROSS EXAMINATION

BY MR. ADERHOLT:

Q Mr. Skelton, if Mr. Williams had

taken the stand and developed in more detail the facts as I indicated them to us here which you have heard, do you think that there is a bare possibility that one juror might have believed his version?

A There is always that possibility.

Q So, as a defense counsel, Mr. Darnell was faced [fol.48] with a twenty-five year old conviction, prior conviction on this man, as opposed to setting up a possible self-defense defense in this case, and he chose to leave him off the stand, but hindsight -- looking at this thing from hindsight, do you think it was as good a choice to put him on the stand?

A I wouldn't have put him on.

Q Why?

A No. 1, the punishment ranged from two to twenty-five years. He could

have very easily gotten twenty-five years for this case, if he had alienated the jury. The jury -- I don't believe there were but about four or five people that said, that was on the State's side that testified -- you would have one man that would get up, and I bet the jury would have thought he was lying and would have added some more years on for lying. I've seen that happen, I've seen defendants get ten years for the crime and fifteen for lying. I'm not saying they would have lied, I'm saying they would have to believe somebody and I would pretty sure think the jury would not have believed Mr. Williams, and this usually [fol.49] aggravates the jury.

Q Okay. But, still, the self-defense issue is a valuable tool for the de-

fense, the issue itself?

A If it's reasonable it is, but in this instance you have one guy saying it was and about four or five saying it wasn't.

Q You still say that there was a bare possiblility --

A Absolutely.

Q Now, after the Hernandez decision was handed down, was there a change from your vantage point in that Court from day to day by the Sheriff's Department in what defendants, jail cases wore?

A To tell you the truth, I don't even know. I very seldom went back to the holdover, I presume they started dressing them in their clothes they were arrested in. We had a lot of objections shortly after that. In two cases I remember quite well, there were three people accused of

robbery, and the description of their clothing was what they were arrested in, and I think one guy was wearing a green shirt and black pants and they brought him out wearing the plack pants and green shirt, and [fol.50] they got very upset with that because the clothing they were dressed in was the clothing they were arrested in, and it matches the description of the robbers. Another case I know of where there was a lot of wailing and turmoil about it, there was a man accused of robbery and was dressed up as a transvestite, and they brought him out in his female clothes, and that upset everybody greatly. They started putting people in the clothes they were arrested in.

Q Don't they still do that?

A Ben, I don't really know. What I have done on several occasions, I'll bring up a suit from home and take it back to the jury room.

Q Mr. Skelton, you're over there as much as I am, you know that they don't put them in those jail clothes any more.

A I don't guess they do, I suppose not.

Q Have you ever seen a man since Hernandez who came out in Harris County Jail on the day of the trial or any day in his prison wear?

A No.

Q But this was very common before Hernandez, was it not?

[fol.51]

A I guess so. I don't -- in fact, we didn't pay that much attention to it, never was a big issue to us. I know when they had the staff meeting and announced Hernandez, it

didn't really make a dent on our policy at all.

Q Are you saying that the Sheriff's Office didn't change its practice?

A I don't know what the Sheriff's Office did, I have no earthly idea. I suppose it did.

MR. ADERHOLT: We have no further questions.

THE COURT: Be any redirect?

MR. CURRY: No, Your Honor.

THE COURT: You may step down, sir. Call your next witness.

(Witness excused.)

MR. CURRY: The respondent rests, Your Honor.

THE COURT: All right. Will there be any rebuttal?

MR. ADERHOLT: No.

THE COURT: This concludes all the proof in the case?

MR. ADERHOLT: Yes.

MR. CURRY: Yes.

[fol.52]

THE COURT: Very well, let me hear -- perhaps we should do this. We will take a brief recess following which I would like to hear ten minutes of oral argument from each side relating the law to the proof that's been adduced here this morning.

We will stand recessed for ten minutes.

(Recess taken.)

THE COURT: All right, Mr. Aderholt, let me hear from you first, please.

(Mr. Aderholt presented oral argument on behalf of the petitioner.)

THE COURT: All right, let me hear from you, Mr. Curry.

(Mr. Curry presented oral argument on behalf of the repondent.)

THE COURT: Is there anything before we adjourn?

MR. ADERHOLT: No, sir, Your Honor.

[fol.53]

MR. CURRY: No, Your Honor.

THE COURT: Very well, this Court will stand adjourned.

(Whereupon at 12:00 o'clock noon, Court was adjourned.)